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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 David Normann,

10 Plaintiff,

11 v.

12 SDQ Fee LLC; Kierland Crossing LLC,

13 Defendants.

No. CV-13-00154-PHX-NVW

ORDER

14
15 Before the Court is Plaintiff's Motion for Summary Judgment, Defendants'
16 Response, and Plaintiff's Reply. (Docs. 32, 34, 37). For the following reasons, the
17 Motion for Summary Judgment will be denied, and an Order to Show Cause will issue to
18 Plaintiff to show why summary judgment should not be granted for Defendants on the
19 issue of accessible parking.

20 **I. LEGAL STANDARD FOR SUMMARY JUDGMENT**

21 Summary judgment is appropriate when the moving party carries its burden of
22 demonstrating that there is no genuine dispute as to any material fact and that it is entitled
23 to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S.
24 317, 322 (1986). A material fact is one that might affect the outcome of the suit under
25 the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual
26 issue is genuine if "the evidence is such that a reasonable jury could return a verdict for
27 the nonmoving party." *Id.*

28 Once the moving party has carried its burden under Rule 56, the party opposing
summary judgment must "set forth specific facts showing that there is a genuine issue for

1 trial.” *Anderson*, 477 U.S. at 256. The facts are “viewed in the light most favorable to
2 the nonmoving party only if there is a genuine dispute as to those facts.” *Scott v. Harris*,
3 550 U.S. 372, 380 (2007). “Where the record taken as a whole could not lead a rational
4 trier of fact to find for the nonmoving party, there is no genuine issue for trial.”
5 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

6 **II. FACTS**

7 The Americans with Disabilities Act (“ADA”) prohibits discrimination against
8 people with disabilities by places of public accommodation. 42 U.S.C. §§ 12181–12189.
9 Defendants SDQ Fee, LLC and Kierland Crossing, LLC lease space to tenants at
10 Scottsdale Quarter, a shopping center and place of public accommodation located in
11 Scottsdale, Arizona. (Doc. 35, ¶ 1). Because it is a place of public accommodation built
12 for first occupancy after January 26, 1993, Scottsdale Quarter must comply with the
13 ADA rules applying to new construction. (Doc. 35 ¶¶ 2, 4); 28 C.F.R. Pt. 36.401(a).

14 Plaintiff David Normann asserts that he has mobility-related impairments from
15 from secondary multiple sclerosis, a degenerative disease that attacks the brain, spinal
16 cord and optic nerves, and a spinal cord injury. (Doc. 35-1). He asserts that he uses a
17 wheelchair, walker, and crutches for mobility assistance and that the size of his
18 wheelchair van requires him to park in handicap accessible parking spaces. (*Id.*).

19 Mr. Normann is a patron of Scottsdale Quarter. (Doc. 35-1). He has visited the
20 property on numerous occasions, alone and with family, and has done business with
21 numerous tenants. (*Id.*). During his visits, he claims to have encountered three
22 architectural barriers which have upset him and hurt him as signs of discrimination on
23 account of his disability. (*Id.*). First, he claims Scottsdale Quarter’s designated
24 accessible parking spaces are not located in accordance with ADA Accessibility
25 Guidelines. (Doc. 32). He asserts that although Scottsdale Quarter provides accessible
26 spaces in its parking garages, it is required to provide accessible parking on the streets
27 adjacent to store entrances. (*Id.*). Second, Mr. Normann claims Scottsdale Quarter’s
28 ramps leading up to certain restaurants are too steep, causing him to experience fatigue
and strain. (*Id.*). Finally, he claims the heaviness of the entrance door to a men’s

1 restroom and the lack of maneuvering space make the restroom difficult to access. (*Id.*).

2 After encountering these barriers, Mr. Normann consulted an expert certified by
3 the International Code Council as an accessibility inspector and plans examiner. (Doc.
4 35, ¶ 1). The expert, Mr. Paul Faber, identified what he believed were twenty barriers to
5 accessibility on the Scottsdale Quarter property. (*Id.* at ¶ 13). The identified barriers are
6 as follows:

- 7 1. Lack of maneuvering clearance at men's room door; heavy door.
- 8 2. Family restroom door requires excessive opening force.
- 9 3. High mirrors and heavy door require excessive opening force.
- 10 4. High changing counter and dispenser at family restroom.
- 11 5. No clearance floor space at ATM machine.
- 12 6. Steep curb ramp at Brio Tuscan Grille.
- 13 7. Steep curb ramp at Menchie's.
- 14 8. Steep curb ramp at sound corner of 73rd place.
- 15 9. Steep curb ramp at Stingray Sushi.
- 16 10. Steep curb ramp at Grimaldi's.
- 17 11. Lack of accessible seating in Quad.
- 18 12. Various barriers at NW1 parking.
- 19 13. Various barriers at NWB1 parking.
- 20 14. Various barriers at NE1 parking.
- 21 15. Various barriers at NEB1 parking.
- 22 16. Various barriers at SE1 parking.
- 23 17. Various barriers at NEB1 parking.
- 24 18. Various barriers at SW1 parking.
- 25 19. Various barriers at SWB1 parking.
- 26 20. Inaccessible curb front parking.

(Doc. 33 ¶ 14).

27 Defendants' expert witness, Karen Haney of Compliance Design Consultants,
28 agreed with most of Mr. Farber's findings, except the finding that the lack of accessible

1 curbside parking is a violation of the ADA Accessibility Guidelines. She also partly
 2 disagreed with item five because the floor space had been cleared in front of the ATM,
 3 with thirteen because she found the number of noncompliant access aisles to be 3 instead
 4 of 4, and with sixteen because she found the number of noncompliant parking signs to be
 5 3 instead of 4. (Doc. 35 ¶ 19)

6 Plaintiff filed suit seeking (1) an injunction prohibiting conduct of business at
 7 Scottsdale Quarter until barriers to Plaintiff's access are removed, (2) an order directing
 8 the removal of all access barriers at Scottsdale Quarter, (3) an award of attorney fees,
 9 costs, and litigation expenses under the ADA, and (4) compensatory damages under the
 10 Arizonans with Disabilities Act. (Doc. 1). Plaintiff then filed this Motion for Summary
 11 Judgment. (Doc. 32).

12 **III. ANALYSIS**

13 To establish a prima facie case of discrimination by a public accommodation
 14 under the ADA, Mr. Normann must show (1) he has a disability, (2) Defendants own,
 15 operate, or lease a place of public accommodation, and (3) he was denied full and equal
 16 treatment because of his disability. 42 U.S.C. §§ 12182(a)-(b); *see Molski v. M.J. Cable,*
 17 *Inc.*, 481 F.3d 724, 730 (9th Cir. 2007). Because Defendants admit that Scottsdale
 18 Quarter is a place of public accommodation, only the first and third elements are disputed
 19 on this Motion for Summary Judgment.

20 **A. Whether Mr. Normann has a disability**

21 **i. Legal Standard**

22 The ADA defines a disability, in part, as “a physical or mental impairment that
 23 substantially limits one or more major life activities.”¹ 42 U.S.C. § 12102(1)(A). A
 24 physical impairment is “[a]ny physiological disorder or condition . . . affecting one or
 25 more body systems, such as [the] neurological [or] musculoskeletal” systems. 29 C.F.R.
 26 Pt. 1630.2(h)(1). “Major life activities” include, but are not limited to, caring for oneself,

27
 28 ¹ Plaintiff has not alleged he has a record of disability or that he is regarded as disabled, so the alternative definitions of disability under the ADA are not applicable. *See* 42 U.S.C. § 12102(1) (defining “disability” under the ADA).

1 performing manual tasks, walking, standing, lifting, and bending. *See* 42 U.S.C.
2 § 12102(2)(A). An impairment “need not prevent, or significantly or severely restrict, the
3 individual from performing a major life activity in order to be considered substantially
4 limiting,” but must “limit[] the ability of an individual to perform a major life activity as
5 compared to most people in the general population.” 29 C.F.R. Pt. 1630.2(j).

6 The definition of disability is “construed in favor of broad coverage of individuals
7 . . . to the maximum extent permitted by the terms of [the statute].” 42 U.S.C.
8 § 12102(4)(A). “To survive summary judgment, an affidavit supporting the existence of
9 a disability must not be merely self-serving and must contain sufficient detail to convey
10 the existence of an impairment.” *Rohr v. Salt River Project Agric. Imp. & Power Dist.*,
11 555 F.3d 850, 859 (9th Cir. 2009) (internal citations and quotation omitted).

12 **ii. Analysis**

13 Defendants assert Plaintiff has failed to prove he is a person with a disability
14 because he has not shown that he is substantially limited in the major life activity of
15 walking. (Doc. 34). In response to Defendants’ interrogatories, Mr. Normann states that
16 he suffers from “secondary progressive multiple sclerosis and spinal chord injury, which
17 affect his mobility.” (Doc. 35-1 ¶ 2). In his signed affidavit, he attests that he “requires
18 the use of a wheelchair or walker for mobility” and relies on an oversized van to transport
19 his wheelchair. (Doc. 32, 36). Defendants asked Mr. Normann to produce documents
20 relating to his contention that is a person with a disability, but Plaintiff failed to produce
21 any, claiming he had none in his possession. (Doc. 35 ¶ 5).

22 To carry his burden on this Motion for Summary Judgment, Mr. Normann needs
23 to show that there is no issue of material fact regarding whether his disability limits his
24 ability “to perform a major life activity as compared to most people in the general
25 population.” 29 C.F.R. Pt. 1630.2(j). Mr. Normann’s statements that he has multiple
26 sclerosis and uses devices for mobility assistance could, in the absence of controverting
27 evidence or reason to doubt his self-serving statements, carry his burden of proving that
28 he is substantially limited in the major life activity of walking. But on this record, his
self-serving statements regarding his disability could reasonably be doubted. If true, his

1 disability would be corroborated by an abundance of objective evidence. Yet Mr.
 2 Normann has refused to produce any such documentary evidence. Medical records, a
 3 doctor's note, or a handicapped parking card would have sufficed. His refusal, despite
 4 appropriate discovery requests, to produce any verifying evidence suffices to put his own
 5 testimony in doubt and creates a material issue of fact regarding whether Mr. Normann is
 6 a person with a disability. Summary judgment must be denied on the issue.

7 **B. Assuming he is a person with a disability, was Mr. Normann**
 8 **denied full and equal treatment by Scottsdale Quarter?**

9 **a. Standing**

10 To have standing under the ADA, a plaintiff must demonstrate that he has suffered
 11 an injury-in-fact, that the injury is traceable to the defendants' actions, and that the injury
 12 can be redressed by a decision in his favor. *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631
 13 F.3d 939, 946 (9th Cir. 2011) (en banc). A person with a disability suffers an injury-in-
 14 fact when he encounters a barrier at a place of public accommodation that "deprives him
 15 of full and equal enjoyment of the facility due to his particular disability." *Oliver v.*
 16 *Ralphs Grocery Co.*, 654 F.3d 903, 907 (9th Cir. 2011). Because the ADA Accessibility
 17 Guidelines "establish the technical standards required for 'full and equal enjoyment,' if a
 18 barrier violating these standards relates to a plaintiff's disability, it will impair the
 19 plaintiff's full and equal access, which constitutes 'discrimination' under the ADA."
 20 *Chapman*, 631 F.3d at 947. Under the ADA, a plaintiff is injured the first time he or she
 21 encounters an architectural barrier that relates to his or her disability. *Id.* at 950. Once
 22 the first barrier is encountered, a plaintiff may sue for injunctive relief as to all other
 23 barriers related to his or her disability, regardless of whether he or she actually
 24 encountered the other barriers. *Id.* at 951.

25 In addition to showing he actually encountered a barrier related to his disability, a
 26 plaintiff must also demonstrate a "real and immediate threat of repeated injury" in the
 27 future. *Chapman*, 631 F.3d at 946 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496
 28 (1974)). A plaintiff can demonstrate a real and immediate threat of future injury by
 demonstrating an intent to return to the place of public accommodation. *Id.* at 949.

1 Defendants argue that, assuming Mr. Normann is a person with a disability, he has
2 not been injured by the alleged barriers because he has patronized Scottsdale Quarter
3 frequently, has not been deterred from visiting or purchasing anything from its
4 establishments, and intends to return. (Doc. 34). They also assert that Mr. Normann only
5 experienced three of the twenty barriers identified by his expert and has not produced any
6 evidence that he was injured by them.

7 The barriers, however, did not need to prevent Mr. Normann from patronizing
8 Scottsdale Quarter for him to have standing to sue. Assuming for the purposes of this
9 section that Mr. Normann is a person with a disability, Mr. Normann was injured the first
10 time he encountered an architectural barrier related to his disability. Defendants' expert
11 confirmed that the men's bathroom door did not comply with the ADA Accessibility
12 Guidelines. Because the bathroom door did not comply with the ADA Accessibility
13 Guidelines, it would have deprived a person with the handicaps Mr. Normann claims of
14 full and equal access to the facilities. After encountering a single barrier, he would be
15 entitled to bring suit for injunctive relief on account of all barriers present at Scottsdale
16 Quarter that relate to his alleged disability. Furthermore, his frequent patronage of the
17 shops at Scottsdale Quarter and his intent to return evidences a real risk of future injury.
18 Accordingly, if Mr. Normann is a person with a disability, he has standing to sue for
19 injunctive relief as to all architectural barriers related to his disability at Scottsdale
20 Quarter, whether he actually encountered them or not.

21 **b. Architectural barriers**

22 To establish that he was denied full and equal treatment because of his alleged
23 disability, Mr. Normann must prove that Defendants failed to "design and construct
24 facilities . . . that are readily accessible and usable by individuals with disabilities."
25 28 C.F.R. Pt. 36.401(a). Although the ADA does not establish technical standards for
26 accessibility, it directs the Department of Justice to issue regulations that create design
27 standards for places of public accommodation. 42 U.S.C. § 12186(b). The Department
28 of Justice's regulations must "be consistent with the minimum guidelines and
requirements issued by the Architectural and Transportation Barriers Compliance Board

1 [(the ‘Access Board’)],” a federal agency tasked with establishing the minimum
 2 guidelines for accessible public accommodations. *Miller v. Ca. Speedway Corp.*, 536
 3 F.3d 1020, 1024-25 (9th Cir. 2008) (citing 42 U.S.C. § 12186(c); 29 U.S.C. § 792(b)).
 4 In 1991, the Access Board published its first ADA Accessibility Guidelines, and, after an
 5 opportunity for public comment and revision, the Department of Justice adopted the
 6 guidelines verbatim. 56 Fed.Reg. 35,408-01 (1991). The guidelines set technical
 7 standards “for accessibility to places of public accommodation . . . [that were] to be
 8 applied during the design, construction, and alteration of such buildings.” 28 C.F.R. Pt.
 9 36, App. A. Because Scottsdale Quarter was first constructed for occupancy after
 10 January 26, 1993, it is subject to the 1991 ADA Accessibility Guidelines. 28 C.F.R. Pt.
 11 36.401(a).

12 **i. Parking spaces**

13 The ADA Accessibility Guidelines state, “In parking facilities that do not serve a
 14 particular building, accessible parking shall be located on the shortest accessible route of
 15 travel to an accessible pedestrian entrance of the parking facility.” 28 C.F.R. Pt. 36, App.
 16 A § 4.6.2. The number of accessible spots required is dictated by the total parking
 17 available in each lot. *Id.* at § 4.1.2(5)(a). If a building is served by multiple lots,
 18 accessible spaces do not need to be provided in each lot and may be “provided in a
 19 different location if equivalent or greater accessibility, in terms of distance from an
 20 accessible entrance, cost and convenience is ensured.” *Id.*

21 Scottsdale Quarter is a private facility with two large parking garages that serve its
 22 ten buildings. (Doc. 35; DSOF ¶¶ 15-17). It also offers fifty-four curbside, parallel
 23 parking spaces along the private streets that traverse its property. (*Id.*). All of the
 24 accessible parking spaces serving the property are located in the two garages. (*Id.*).
 25 Although the parties agree that Scottsdale Quarter offers the required number of
 26 accessible spaces, Mr. Normann asserts that, under the ADA Accessibility Guidelines,
 27 Scottsdale Quarter is required to provide accessible spaces not only in its garages, but
 28 also along its private streets.

Nothing in the ADA Accessibility Guidelines requires Scottsdale Quarter to

1 provide accessible curbside parking in addition to the accessible parking it already offers
2 in its garages. The accessibility requirements implemented by the ADA are detailed. As
3 written, they apply only to parking lots and facilities and make no mention of curbside
4 parallel parking spaces. *See, e.g.*, 28 C.F.R. Pt. 36, App. A § 4.1.2(5)(a) (mentioning
5 “parking lot”); § 4.6.2 (mentioning “parking facilities”). When constructing its facility,
6 Scottsdale Quarter verified that it was not required to construct accessible curbside
7 parking by consulting with an ADA technical advisor at the U.S. Department of Justice.
8 (Doc. 35-1). The technical advisor confirmed that because parallel, storefront parking
9 spaces are not part of a parking lot or parking facility, they are not covered by the ADA
10 standards of accessible design. *See* 28 C.F.R. Pt. 36, App. A § 4.1.2(5)(a).

11 Plaintiff suggests the garages do not provide appropriate accessible parking
12 because the *ADA Guide for Small Businesses* requires property owners to “[l]ocate
13 accessible parking spaces as close as possible to the accessible entrances on an accessible
14 route to the building.” Office of Small Bus. Admin., Americans with Disabilities Act:
15 *ADA Guide for Small Businesses* (1999). He interprets this instruction to require
16 property owners to locate accessible parking on the shortest route between store entrances
17 and any customer parking. (Doc. 32). The *ADA Guide for Small Businesses*, however,
18 provides informal assistance to small businesses and its guidelines are not “legal
19 interpretations of the [ADA].” *ADA Guide for Small Businesses*, pg. i. Even if the guide
20 was binding, Plaintiff’s reading is overbroad. The guideline does not require accessible
21 parking immediately adjacent to every tenant’s storefront, but, rather, requires accessible
22 parking to be located as close as possible to entrances that provide access to the entire
23 facility.

24 The two parking garages serve all ten buildings at Scottsdale Quarter, and the
25 accessible spaces are located on “the shortest accessible route of travel to an accessible
26 pedestrian entrance of the parking facility.” 28 C.F.R. Pt. 36, App. A § 4.6.2; (DSOF ¶¶
27 41-44). Patrons with disabilities can park on the ground floor of either garage and access
28 a route that connects all of the property’s buildings. (DSOF ¶¶ 41-44). This is exactly
the type of accessibility contemplated by the guidelines. Because Scottsdale Quarter’s

1 parking facilities comply with the ADA Accessibility Guidelines, and this Motion
2 presents no factual dispute over the type and amount of parking offered at Scottsdale
3 Quarter, the Court will issue an order for Plaintiff to show cause as to why summary
4 judgment should not be granted for the Defendants on the issue of accessible parking.

5 **ii. Other features**

6 The parties agree that eleven items identified by Mr. Normann's expert violate the
7 ADA Accessibility Guidelines. The undisputed items, as labeled in Plaintiff's expert
8 report, are Items 1-4, 11, 12, 14, 15, and 17-19. (Doc. 35 ¶ 19). Accordingly, Plaintiff
9 has carried his burden of proving there is no issue of material fact surrounding the
10 barriers identified by his expert in Items 1-4, 11, 12, 14, 15, and 17-19 and that the
11 identified barriers violate the ADA Accessibility Guidelines.

12 In addition to the barriers discussed above, Defendants agree that all but two of the
13 barriers identified in Plaintiff's expert report under Items 13 and 16 violate the ADA
14 Accessibility Guidelines. Item 13 covers parking in the North parking garage on the
15 level designated as B1. Under Item 13, Plaintiff's expert identifies various parking
16 barriers, including narrow access aisles, steep ramps, and low vertical parking space
17 signs. Defendants agree with all of the barriers listed under Item 13 except they argue
18 one of the identified access aisles is actually compliant. Plaintiff's expert claims the
19 disputed aisle, which is required to be at least 60 inches wide, is only 56-57 inches wide.
20 Defendants' expert contends the aisle is actually 93 inches wide. (Doc. 33-4; Doc. 35-1).

21 A similar dispute surrounds an accessible parking sign identified under Item 16 in
22 the South parking garage. Plaintiff's expert asserts that four accessible parking signs are
23 placed only 48 inches above the ground when they are required to be placed 60 inches
24 above the ground. Defendants' expert contends one of the four identified signs is
25 compliant and hangs 60 inches above the ground. (Doc. 33-4; Doc. 35-1). Because there
26 are material issues of fact surrounding the width of the disputed access aisle and the
27 height of the disputed sign, summary judgment cannot be granted for Plaintiff on those
28 barriers. In contrast, there is no issue of material fact regarding the remaining barriers
identified under Items 13 and 16. Summary judgment, however, cannot be granted for

1 Plaintiff because there is a dispute of material fact regarding whether Plaintiff is a person
2 with a disability.

3 Defendants dispute that the access ramps identified in Items 6 through 10 of
4 Plaintiff's expert report violate the ADA Accessibility Guidelines. Although Defendants
5 agree that the slopes of the ramps technically exceed the maximum slope allowed by
6 guidelines, they argue that the amount by which the slopes exceed the maximum slope
7 permitted is negligible. (Doc. 35 ¶¶ 60-65). The ramps, identified as Items 6 through 10
8 in Plaintiff's expert report, exceed the maximum slope allowed by .67%, .77%, .97%,
9 1.07%, and 1.27%. (*Id.*) Defendants argue these deviations are not violations because
10 they are minor and fall within accepted construction deviations. (Doc. 34).

11 As a general rule, new construction must strictly comply with the ADA
12 Accessibility Guidelines, and "the difference between compliance and
13 noncompliance . . . is often a matter of inches." *Chapman*, 631 F.3d at 946-47; *see, e.g.*,
14 ADA Accessibility Guidelines § 4.16.4 (requiring grab bar behind water closets to be at
15 least thirty-six inches long); *id.* § 4.19.6 (stating that "[m]irrors shall be mounted with the
16 bottom edge of the reflecting surface no higher than 40 in (1015 mm) above the finish
17 floor"). The ADA Accessibility Guidelines permit slight deviations by providing that
18 "[a]ll dimensions are subject to conventional building industry tolerances for field
19 conditions." 28 C.F.R. Pt. 36, App. A § 3.2. Plaintiff has failed to show that these
20 deviations exceed industry standards, so summary judgment cannot be granted for
21 Plaintiff on the ramps identified in Items 6 through 10. Summary judgment also cannot
22 be granted on Item 5, the ATM that was blocked by a soda machine, because the parties
23 have not briefed the issue sufficiently.

24 **IV. CONCLUSION**

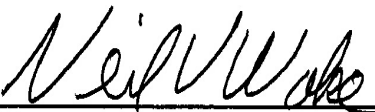
25 Although Mr. Normann has carried his burden of showing that certain barriers at
26 Scottsdale Quarter violated the ADA Accessibility Guidelines, the Motion for Summary
27 Judgment must be denied because there is a dispute of material fact over whether he is a
28 person with a disability. Additionally, on the undisputed facts, Scottsdale Quarter's

1 parking facilities comply with the ADA Accessibility Guidelines. Therefore, Plaintiff's
2 Motion for Summary Judgment will be denied, and Plaintiff will be ordered to show
3 cause why summary judgment should not be granted to Defendants on the issue of
4 accessible parking.

5 IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment
6 (Doc. 32) is denied.

7 IT IS FURTHER ORDERED that Plaintiff show cause by December 4, 2013, why
8 summary judgment should not be granted for Defendants on the issue of accessible
9 parking.

10 Dated this 14th day of November, 2013.

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13 _____
14 Neil V. Wake
15 United States District Judge
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